NO. _____

IN THE

Supreme Court of the United States

October Term, 1984

Bethel School District No. 403;
Christy B. Ingle; David C. Rich;
J. Bruce Alexander; and
Gerald E. Hosman,

Petitioners,

v.

Matthew N. Fraser, a Minor,
and E.L. Fraser, as his
Guardian Ad Litem,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

KANE, VANDEBERG, HARTINGER
& WALKER
First Interstate Plaza
Suite 2100
Tacoma, WA 98402-4391
Telephone: (206) 383-3791

By Harold T. Hartinger
Counsel of Record

And William A. Coats
Clifford D. Foster, Jr.

Petitioners BETHEL SCHOOL DISTRICT NO. 403, CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; and GERALD E. HOSMAN respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 4, 1985.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the First Amendment of the Federal Constitution prohibited public school officials from imposing a three-day suspension from school on a high school student that gave a speech at an all-school assembly containing sexual innuendo, and which was considered indecent, demeaning to female students, and inappropriate by school authorities?

2. Did the Court of Appeals err in holding that a high school disciplinary rule prohibiting students from engaging

in conduct "which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures," was unconstitutional on its face under the First Amendment of the Federal Constitution and the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

3. Did the District Court err in holding that failure of school district rules to define each specific form of disciplinary action that could be imposed upon a student violated the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

4. Did the District Court err in raising and deciding issues of state law sua sponte that were neither raised by the pleadings nor tried by the implicit consent of the parties?

PARTIES TO THE PROCEEDING

The parties to this proceeding, in both the United States District Court and the United States Court of Appeals for the Ninth Circuit, were Plaintiffs Matthew N. Fraser, a minor, and E.L. Fraser, as his guardian ad litem, respondents herein. The Defendants were Bethel School District No. 403, a municipal corporation, Pierce County, Washington; Christy B. Ingle; David C. Rich; J. Bruce Alexander; and Gerald E. Hosman. All of the Defendants are the Petitioners herein.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Law Review Articles

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, infra), will be reported in _____ F.2d ____ (1985). The oral opinion of the United States District Court for the Western District of Washington, The Honorable Jack E. Tanner, United States District Judge, Presiding (App. B, infra), is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 4, 1985. Judgments of the United States District Court for the Western District of Washington were entered on June 8, 1983 and September 1, 1983. The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The constitutional provisions and school district rules at issue are as follows:

U.S. Const. Amend. I:

> Congress shall make no law . . . abridging the freedom of speech. . . .

U.S. Const. Amend. XIV, § 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Bethel High School Disruptive Conduct Rule:

> In addition to the criminal acts defined above, the commission of or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.
>
> * * *

> Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

STATEMENT OF THE CASE

In April of 1983, Plaintiff Matthew Fraser ("Fraser") was a 17 year old high school senior attending Bethel High School, a public school operated by the Defendant, Bethel School District No. 403, in Pierce County, Washington. On April 26, 1983, Fraser spoke on behalf of a candidate for vice president of the Associated Student Body at an all-school assembly that took place during school hours and was attended by approximately 600 students. Students were required to attend either the assembly or a study hall.

The entire text of Fraser's speech is as follows:

> I know a man who is firm--he's firm in his pants, he's firm in his shirt, his character is firm--but most of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally--he succeeds.
>
> Jeff is a man who will go to the very end--even the climax, for each and every one of you.
>
> So vote for Jeff for ASB Vice President--he'll never come between you and the best our high school can be.

Fraser testified he deliberately used sexual innuendo in his speech in hopes that students would perceive its sexual references. During the speech, a school counselor observed students reacting with hooting and yelling, and one male student was observed simulating masturbation. Two other students were observed

simulating sexual intercourse by movement of their hips.

The following day, several teachers delivered written statements to the school principal complaining about the speech. Other teachers reported that the educational process was further disrupted during their classes the following day because of student reaction to the speech, including indignation and embarrassment. An independent educational expert also testified at trial that the speech was sexually harassing to female students and disruptive to the learning process.

On the morning after the speech, Fraser was given oral and written notice that the District believed he had violated the School's disruptive conduct rule. Fraser was also given copies of the written evidence school officials had concerning the allegations against him

and an opportunity to explain the circumstances surrounding his behavior at the assembly. After these discussions, Fraser was informed that his speech had violated the School's disruptive conduct rule, that he would be suspended from school for three days, and that his name would be removed from consideration as a candidate for graduation speaker at the upcoming commencement ceremony.

This litigation followed with a complaint alleging federal constitutional and civil rights claims under 42 U.S.C. § 1983 was filed on May 23, 1983. After a one-half day hearing on May 31, 1983, the United States District for the Western District of Washington, the Honorable Jack E. Tanner presiding, ruled that (1) the suspension violated Fraser's rights of free expression under the First Amendment of the Federal Constitution, (2) the school's disruptive conduct rule

was unconstitutionally vague and overly broad, (3) the failure of the disciplinary rules to specify removal of names from the candidate's list for graduation violated due process, and (4), sua sponte, the suspension violated state law. The Court also announced that an injunction would issue requiring the District to allow Fraser to speak at the Bethel High School commencement exercises.

On June 8, 1983, the District Court issued findings of facts and conclusions of law, an injunction, and a declaratory judgment. On September 1, 1983, the District Court entered a final judgment awarding Fraser damages, costs, and attorneys' fees. The District timely perfected an appeal to the United States Court of Appeals for the Ninth Circuit.

On March 4, 1985, a three-judge panel of the Ninth Circuit issued an

opinion affirming the judgment of the District Court, with The Honorable Eugene A. Wright dissenting.

EXISTENCE OF JURISDICTION BELOW

The Respondent initiated this action in the United States District Court on May 23, 1983, pursuant to 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit invoked 28 U.S.C. § 1291 for jurisdiction to hear the District's appeal.

ARGUMENT FOR GRANTING THE WRIT

The Court of Appeals' opinion frustrates the authority of public school officials to maintain community standards of decency and civility in the nation's public schools. Prior decisions of this Court recognize that the public school environment requires a delicate accommodation between the constitutional rights of students and a state's compelling interests in providing an education,

including promotion of respect for authority and the community's moral values.

The Court of Appeals' decision, however, creates a novel First Amendment "right" for students to express themselves in a sexually offensive and indecent manner, subjects school disciplinary rules to the same due process standards for vagueness and overbreadth as criminal statutes, and threatens to interject the federal judiciary into the daily operation of the public schools. This petition should be granted because the lower courts' decisions not only conflict with the applicable decisions of this Court and other Courts of Appeals, but also involve important, and unsettled issues of federal law concerning the free speech rights of students and school disciplinary rules that ought to be resolved by this Court.

Prior decisions of this Court have repeatedly emphasized that local school boards and school officials possess broad and comprehensive management authority over the conduct of students in the public schools. Board of Education v. Pico, 457 U.S. 853, 863-65 (1982); Tinker v. Des Moines School District, 393 U.S. 503 (1969). These decisions also recognize that the inculcation of community values, including social and moral values, are legitimate and essential goals of public education. Board of Education v. Pico, supra, 457 U.S. at 864-69; Ambach v. Norwood, 441 U.S. 68, 76-77 (1979). To be sure, the discretionary authority of school officials does not transcend the limitations of the Federal Constitution. Nevertheless, the unique demands placed upon the state in its role as educator, including the need to maintain an environment in which

learning and social maturation can occur, require certain limitations on the constitutional rights of students. As noted in New Jersey v. T.L.O., 469 U.S. _____, 83 L. Ed.2d 720 (1985), maintenance of a proper educational environment allows the constitutional "enforcement of rules against conduct [by students] that would be perfectly permissible if undertaken by an adult." 83 L. Ed.2d at 733.

In the present case, however, the Court of Appeals has rendered school officials powerless to discipline a student's manner of expression absent a showing the speech either caused a physical disruption of the educational process or was "obscene" under the standards of cases such as Miller v. California, 413 U.S. 15 (1973) and Ginsberg v. New York, 390 U.S. 629 (1968).

The majority's analysis misapplied this Court's landmark holding in Tinker v. Des Moines School District, supra. Tinker's recognition that school officials may curtail the exercise of student speech if a reasonable forecast of substantial disruption to the educational process can be made did not address the problem of indecent or profane language. Indeed, Tinker is analytically unsuited to weigh properly the constitutional values and educational interests at stake in such cases. Thomas v. Board of Education, 607 F.2d 1043, 1055 (2nd Cir. 1979) (Newman, J., concurring), cert. denied, 444 U.S. 1081 (1980); Haskell, Student Expression in the Public Schools: Tinker Distinguished, 59 Geo. L.J. 37, 49 (1970). Further, the Court of Appeals erroneously viewed Tinker's material disruption standard to require uncontrollable student behavior, such as

a riot or interference with school schedules. App. A., A-15 to 16. The opinion ignores the less tangible disruptions of the educational process, such as the demeaning and disruptive effect Fraser's speech had on female students' learning environment, that occur daily in our public schools and have traditionally warranted disciplinary action without oversight by federal judges.

The Court of Appeals also rejected the constitutional authority of school officials to regulate offensive and indecent student speech based upon the need to preserve the integrity of the learning process and to protect the sensibilities of other students. App. A, A-22 to A-32. The lower courts' analyses equate a school's efforts to maintain and promote standards of decency and civility in the narrow confines of the school

grounds and school day with the constitutional requirements imposed upon a state or local government when it seeks to suppress completely the dissemination of sexually oriented materials to the public. Surely, school district authorities have greater authority to regulate the speech of students in the school environment than the state possesses in dealing with pornographers, especially when the objectionable speech occurs before a captive audience of 14 to 18 years old at a mandatory school assembly.

By denying school officials power to regulate student speech deemed indecent, the Court of Appeals' decision, as a practical matter, also prevents any meaningful regulation of sexually suggestive or crude language by students. The majority opinion found that Bethel High School's disruptive conduct rule was unconstitutional on its face:

> It follows from our First Amendment Analysis that we must also affirm Judge Tanner's declaration that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent' even when engaged in extracurricular activity. . . .[1]

App. A, A-43, n.12.

To satisfy this facial overbreadth standard, school rules designed to regulate use of indecent language by students at school would have to define specifically the types of sexual conduct or language prohibited. Miller v.

---

[1]The majority opinion's characterization of the assembly as "extracurricular" is factually and legally unsupported. The assembly occurred at school, during school hours, and attendance at the assembly or a study hall was mandatory. The school's Associated Student Body, which the campaign speeches concerned, is by state statute subject to the control of the District. RCW 28A.58.115, reprinted in App. D.

California, supra, 413 U.S. at 24. If this were the law, a specific description of prohibited language or sexual conduct would have to be set forth in each student's rule book. This would (1) set an inflexible standard unduly limiting school officials' discretion, (2) tempt students to engage in otherwise offensive, but undefined conduct, and (3) be offensive and shocking in itself to many students and parents. See, e.g., Ginsberg v. New York, supra, 390 U.S. at 645-46 (1968) (specific definitions of prohibited materials). Indeed, the rule at issue, as in most public schools, appears in handbooks for children as young as 12 years old. Because the majority's opinion deprives public school officials of the authority to deal with indecent student speech absent a showing of "obscenity," and because school district rules cannot be drafted with the

specificity required by this Court's obscenity decisions, public schools will be powerless to deal with indecent student speech or behavior.[2]

The First Amendment constraints the Court of Appeals imposes on public school officials also conflicts with this Court's recognition that school authorities may regulate the manner of expression of ideas in the school environment for educational reasons unless the motivating factor for a particular action is disagreement with the ideas affected or an intent to impose a political orthodoxy upon the students. In Board of Education v. Pico, supra, all of the

---

[2]The Ninth Circuit's decision will force school officials to stop conducting assemblies with student speakers if a student's use of indecent language or manner of expression is beyond the pale of constitutionally sound disciplinary action.

opinions filed recognized school officials' authority to make decisions based upon factors such as educational suitability or decency when deciding to remove books from the school library, absent proof that the motivating factor for a decision was decisively based on disagreement with the ideas expressed in the particular books. Clearly, school authorities retain discretionary authority to regulate student behavior on the basis that it is indecent, vulgar, or educationally unsuitable.

The Petitioners submit that the analysis suggested by Pico and by Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) accommodates student rights of free expression with the legitimate educational demands of the school environment. The Court of Appeals' fear that allowing school officials the constitutional authority to

regulate indecent speech is a too amorphous standard can be resolved by holding that such regulation is permissible, absent a showing that the school's action was actually motivated by a desire to suppress the expression of ideas. Such a standard preserves school officials' authority to maintain standards of civility and decency within the captive confines of the school environment while protecting the full spectrum of ideas against official suppression. As stated in Federal Communications Commission v. Pacifica Foundation, supra, "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." Id. at 743, n. 18. Given the undeniable importance of preserving decency and decorum

in the public schools, a constitutional analysis of indecent student speech based upon Pico and Pacifica would provide much needed guidance to public school officials throughout the nation.

Equally significant is the Court of Appeals' affirmation of the District Court's holding that school district disciplinary rules are subject to the same due process standards for vagueness and overbreadth as criminal statutes. As noted in New Jersey v. T.L.O., supra, school disciplinary rules must be capable of addressing a myriad of circumstances that require prompt and effective disciplinary action.

School discipline helps teach students minimum standards of behavior for both the classroom and society. Rules and disciplinary procedures, moreover, are typically developed by local school boards with the active

participation of concerned parents, school officials, and members of the community, and reflect the community's expectations for socially acceptable conduct. Disciplinary rules furthering those legitimate educational and community goals must be reviewed in light of the unique requirements of the school environment, and, indeed, circuit courts addressing this question have refused to apply criminal vagueness and overbreadth standard to school disciplinary rules. E.g., Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973); Esteban v. Central Missouri State College, 415 F.2d 1077, 1087-89 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 442 (5th Cir. 1973).

To impose the Court of Appeals' and District Court's criminal statute stan-

dard of review for school disciplinary rules would threaten the enforceability of most, if not all, disciplinary rules in effect in the public schools. This Court should grant review to resolve the conflict created over the appropriate due process standard for reviewing school disciplinary rules and hold that Bethel High School's disruptive conduct rule gave fair and constitutionally sound notice of proscribed conduct within the school environment. See Grayned v. City of Rockford, 408 U.S. 104, 112 (1972).[3]

---

[3]Similar considerations warrant this Court's review of the District Court's holding that the District's failure to specify all forms of possible punishment for a violation of school rules violated Fraser's due process rights under the Fourteenth Amendment. As recognized in New Jersey v. T.L.O., supra, the preservation of order in the educational environment requires flexibility in school disciplinary procedures. 83 L. Ed.2d at 733. By requiring each form of potential punishment to be spelled out in

The Court of Appeals' decision, then, conflicts with the prior decisions of this Court and other federal circuit courts of appeals in both its analysis of student free speech rights in the school environment and the application of due process standards for criminal statutes' overbreadth and specificity to school disciplinary rules. These issues are matters of undeniable public concern and involve important questions of federal constitutional law that should be settled definitively by this Court.

Continuation of Fn.3:

a disciplinary rule, the District Court's analysis frustrates that goal. Concerning the District Court's sua sponte ruling on state law, which was unaddressed by the Court of Appeals, the decision implicitly sanctioned a departure so far removed from the accepted and usual course of judicial proceedings by the District Court that this Court's power of supervision should be exercised pursuant to Sup.Ct.R. 17.1.(a).

Our nation's public schools are currently undergoing unprecedented public scrutiny and a widely shared, and often well-founded, perception exists that school authorities are unable to maintain order and discipline within the school environment, let alone provide quality education to the nation's young. See, e.g., New Jersey v. T.L.O., supra, 83 L. Ed.2d at 733. The Court of Appeals' decision sanctions an unprecedented judicial intrusion into the day-to-day operation of a public school, and seriously undermines the authority of educators to fulfill the public's expectations of decency and order in the educational system.

Absent a showing that the decisive factor in a disciplinary action was an intent to suppress ideas, the compelling governmental and educational interests of maintaining standards of civility and

decency in the school environment are more constitutionally significant than an adolescent's choice of indecent means to express himself. This Court should grant review and clearly hold that school authorities do indeed retain authority to regulate indecent speech by students under disciplinary rules drafted for the unique needs of the school environment.

DATED this 18th day of April, 1985.

KANE, VANDEBERG, HARTINGER
& WALKER
Harold T. Hartinger
William A. Coats
Clifford D. Foster

By Harold T. Hartinger
HAROLD T. HARTINGER

Of Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW N. FRASER, a minor, and E.L. FRASER, as his Guardian Ad Litem,	)	
Plaintiffs-Appellees,	)	NO. 83-3987 NO. 83-4142 D.C. NO. CV 83-306T
v.	)	
BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; and GERALD E. HOSMAN,	)	OPINION
Defendants-Appellants.	)	

Appeal from the United States
District Court for the
Western District of Washington
Honorable Jack E. Tanner
U.S. District Judge, Presiding

Argued and Submitted
March 7, 1984

BEFORE: WRIGHT, GOODWIN and NORRIS,
Circuit Judges.

NORRIS, Circuit Judge:

Bethel School District appeals a judgment for declaratory and injunctive relief, damages, and $12,750 costs and

attorney fees in this civil rights action brought under 42 U.S.C. § 1983 by a student who claimed that the District had abridged his freedom of speech as protected by the First and Fourteenth Amendments. We affirm.

I

On April 26, 1983, appellee Matthew N. Fraser, then a seventeen-year-old senior at Bethel High School in Tacoma, Washington, nominated a friend and classmate for school office at a student-run assembly called for that purpose. The following is the entire text of Fraser's nominating speech:

> "I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most of all, his belief in you, the students of Bethel is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard,

pushing and pushing until finally - succeeds.

Jeff is a man who will go to the very end - even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president - he'll never come between you and the best our high school can be."

The day after he delivered the speech, Fraser was asked to report to the assistant principal's office and to produce a copy of the text of his speech. At the meeting, Fraser was given notice that he was being charged with violating

the school's disruptive conduct rule.[1] After he was given an opportunity to explain his conduct, he was suspended for three days. Fraser, who was a member of the Honor Society and the debate team and the recipient of the "Top Speaker" award in statewide debate championships for two consecutive years, was also informed that his name would be removed from a

---

1. The rule, which was published in the school's student handbook, states:

> In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.
>
> ...
>
> Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

previously approved list of candidates on the ballot for graduation speaker. Even though his name was stricken from the ballot, he was elected graduation speaker by his classmates on a write-in vote, receiving the second highest number of votes cast. The District, nevertheless, continued to deny him permission to speak.

Fraser initiated a grievance of the disciplinary action by making a submission to the Superintendent of the Bethel School District. After the grievance was denied, Fraser, joined by his father as guardian ad litem, filed this civil rights action. After an evidentiary hearing at which the school principal, two assistant principals, several teachers and Fraser all testified, Judge Tanner issued a declaratory judgment that the School District violated Fraser's rights under the First and Fourteenth

Amendments under the United States Constitution and the Civil Rights Act by subjecting him to a three-day suspension and removing his name from the list of candidates for the graduation speaker, and that the punishment imposed upon Fraser was null and void. Judge Tanner also enjoined the District from refusing to allow Fraser to participate in Bethel High School's commencement exercises as a graduation speaker and awarded Fraser $278 as damages and $12,750 as costs and attorney's fees. The District invokes our jurisdiction to hear its appeal under 28 U.S.C. § 1291.

Before we address the District's arguments on appeal, we think it is helpful to review a few basic principles of First Amendment jurisprudence. It is well established that high school students do not "shed their constitutional rights to freedom of speech or expression

at the schoolhouse gate." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969). It is also well established, however, that a student's First Amendment rights are not absolute; the limits of a student's right to express himself must be defined in light of the special characteristics of the school environment. Id, at 506. As our court said in Nicholson v. Board of Education, 682 F.2d 858 (9th Cir. 1982), "In the high school setting, school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students." Id. at 863. The discretion of school authorities in managing school affairs is necessarily limited, however, by "the imperatives of the First Amendment." Board of Eduction, Island Trees Union Free School District v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion).

Under Tinker and its progeny, "school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech, and ... courts will not rest content with officials' bare allegation that such a basis existed.'" Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977) quoting Eisner v. Stamford Board of Education, 440 F.2d 803, 810 (2d Cir. 1971). See also, Scoville v. Board of Education, 425 F.2d 10, 13 (7th Cir.), cert. denied, 400 U.S. 826 (1970). Under our Constitution, it is the role of the judicial branch of government to resolve First Amendment controversies between students and public school officials such as the one between Matthew Fraser and the Bethel School District. A celebrated case in point is West Virginia v. Barnette, 319 U.S. 624 (1943), where the Supreme Court was called upon to decide whether a public

school student could be compelled to salute the flag. Ruling in favor of the student, the Court, speaking through Justice Jackson, said:

> "The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures -- Boards of Education not excepted. These have, of course, important delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

Id. at 637.

We must address three basic arguments made by the District in support of its claim on appeal that the disciplinary action did not abridge Fraser's constitutional rights: (1) The District may discipline Fraser because the nominating speech had a disruptive effect on the educational process of the school; (2) the District's interest in maintaining a level of civility at the school justified its disciplinary action against Fraser

for using language which school officials consider to be indecent; and (3) the District may discipline Fraser for using language considered to be objectionable because the speech was made at a school-sponsored function and was an extension of the school program. We will consider each argument in turn.[2]

---

2. The question whether Fraser's First Amendment rights were violated is a mixed question of law and fact since it requires us to apply principles of First Amendment jurisprudence to the specific facts of this case. The appropriate standard of review is de novo because, as we said in United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984), "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles .... The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights." Id. at 1202-03.

II

We agree with the District that the First Amendment does not prohibit school officials from disciplining a student who materially disrupts the educational process. As the Supreme Court said in Tinker, student speech or conduct is "not immunized by the constitutional guarantee of freedom of speech" if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513.

Tinker involved three high school students who were suspended for continuing to wear black armbands as a symbolic protest against the war in Vietnam after being asked to remove them. The Supreme Court held that the suspension violated the students' First Amendment rights because the school district failed to establish that the black armbands had a disruptive effect of the operations of

the school or that the school officials had reason to anticipate that the armbands would cause a disruption. The Tinker Court ruled that the students' Constitutional right to protest the war by wearing black armbands could not be infringed because there were no "facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." Id. at 514.

Just as in Tinker, the Bethel School District has failed to carry its burden of demonstrating that Fraser's use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process. In support of its contention that the speech was disruptive, the District cites the testimony of

Gary McCutcheon, a school counselor who testified that some students at the assembly reacted to Fraser's speech with "hooting and yelling." Appellant's Brief at 3. Mr. McCutcheon testified as follows:

> Q: Let's first go with what did you hear from the student body?
>
> A: Not too dissimilar to what Mrs. Hicks just reported, the students were pockets of high volume conversations, hooting, yelling, which is not atypical to a high school auditorium assembly and the auditory, the sounds were not too dissimilar to any auditorium sounds I have heard over the many assemblies I have been at Bethel High School.
>
> Q: Were there physical activities as well?
>
> A: I think of particular interest might be perhaps was something I hadn't seen before. I had seen one student on the side of the bleachers where I was sitting actually simulate masturbation and two students on the opposite bleachers were simulating the sexual intercourse movement with hips.
>
> Q: Can you show us what you mean?

A: I prefer not to.

Q: I will defer to that, was there any student reaction to all of this other than the ones that were hooting?

A: Student reaction to the three cases I mentioned?

Q: Some students were hooting and some students were acting out, were all of the students doing that?

A: No, one student in the first case and two students in the opposite bleachers in the second case. That is the only three I noticed that were doing anything that was different.

Q: Did you note any student reaction to this conduct?

A: I think -- gee, I can't pinpoint it, I say in general a couple of students around that particular three individuals were getting more aroused volume wise with their voice, I would say.

That testimony is the only evidence that the District cites in its brief in support of its contention that Fraser's speech disrupted the assembly.

The record also contains the testimony of Irene Hicks, a teacher who also

heard the speech. She described the student reaction as follows:

> A: The best way to describe it, I think, is mixed. There were pockets of loud clapping, hoots and hollering and then there were other students that were sitting there, I guess my best words to describe it is as rather bewildered, not understanding what the kids were clapping about and why there was such a difference in reception to the speech.
>
> ...
>
> A: The kids were, as I said, some were just kind of bewildered and the others were just saying, yahoo, wonderful, we are all for it, great.

Thus, what the evidence demonstrates is that Fraser's speech evoked a lively and noisy response from the students, including applause, and that a few of the students reacted with sexually suggestive movements. The administration had no difficulty in maintaining order during the assembly and Fraser's speech did not delay the assembly program. Fraser was

the second to last speaker, followed by his candidate, Jeff Kuhlman, who then made the final speech of the afternoon without incident. The assembly, which took place after the last school class of the day, was dismissed on schedule.

The only other evidence cited by the District to support its claim that the speech was disruptive of the educational process is the testimony of Debbie Carmandi, a home economics teacher, who said that during class the next day the students expressed so much interest in Fraser's speech that she devoted approximately ten minutes to a discussion of it. Judge Tanner summarized her testimony as follows: "On the day after the speech was delivered, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher

then invited a class discussion of the speech." Finding of Fact No. 5.

Given the evidence before us, we fail to see how we can distinguish this case from Tinker on the issue of disruption. Just as the record in Tinker failed to yield evidence that the wearing of black armbands resulted in a material interference with school activity, the record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body "was not atypical to a high school auditorium assembly." In our view, a noisy response

to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser's First Amendment right to express himself freely.

We find it significant that although four teachers delivered written statements to an assistant principal commenting on Fraser's speech, none of them suggested that the speech disrupted the assembly or otherwise interfered with school activities.[3] See, Finding of Fact No. 8. Nor can a finding of material disruption be based upon the evidence that the speech proved to be a lively

---

3. Three of the teachers disapproved of the speech as "inappropriate" for a high school assembly. The fourth found nothing offensive about it.

topic of conversation among students the following day.

We recognize that the principal, assistant principals and some teachers thought that Fraser's speech was inappropriate for a school assembly because of

what they considered to be sexually explicit language.[4] In response to questioning by Judge Tanner, both the principal, David Rich, and the assistant principal, Lee Morrison, testified that in their view the word "inappropriate" was synonymous with the word "disruptive" in the school context. The mere fact that some members of the school community considered Fraser's speech to be inappropriate does not necessarily mean it was disruptive of the educational process. The First Amendment standard Tinker requires us to apply is material disruption, not inappropriateness. As the Supreme Court said in Tinker

4. There is no evidence in the record indicating that any students found the speech to be offensive. Fraser was the only student to testify.

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508. Thus, we conclude that the District has failed to demonstrate that the speech had a materially disruptive effect on the educational process.

III

The District's second major argument is that regardless whether the speech was disruptive, it is not prohibited by the First Amendment from disciplining Fraser for using sexual references which, in the opinion of school officials, made the

speech "indecent."[5] The thrust of this argument is that school officials have a legitimate interest in protecting teachers and students from speech deemed to be offensive and that this interest outweighs Fraser's interest in using sexual innuendo in his speech. In making this argument, the District relies heavily on

---

5. It is well settled that speech that is legally obscene does not qualify for First Amendment protection. See Roth v. United States, 354 U.S. 476 (1957). The District does not contend, however, that Fraser's speech was obscene. To decide whether an expression is obscene, a trier of fact determines "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), and the concurring opinion of Judge Newman in Thomas v. Board of Education, 607 F.2d 1043 (2d Cir. 1979).

In Pacifica, the Supreme Court held that the First Amendment did not prohibit the Federal Communications Commission from regulating a radio broadcast that the Commission and a majority of the Court deemed to be indecent, although not obscene. Specifically, the Court upheld a Commission order declaring that a radio broadcast of George Carlin's "Filthy Words" monologue was indecent within the meaning of 18 U.S.C. §1464.[6] In upholding the Commission's order against constitutional attack, the Supreme Court emphasized that of all forms of communication, broadcasting has received the most limited First Amendment protection for two principal reasons: (1) broad-

casting intrudes directly on the privacy of an unwilling listener while he or she is at home, 438 U.S. at 748; and (2) broadcasting is uniquely available to unsupervised children, even those too young to read. Id. at 749.

In Thomas, 607 F.2d 1043 (2d Cir. 1979), the Second Circuit held that the First Amendment rendered school officials powerless to discipline students for publishing an off-campus newspaper specializing in sexual satire. Because the students' on-campus activity in publishing and distributing the newspaper was de minimis, the majority in Thomas did not reach the question whether the

---

6. 18 U.S.C. §1464 provides, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

students could have been punished for distributing the newspaper on campus. Id. at 1050. That question, however, was discussed by Judge Newman in his separate concurring opinion. Id. at 1053. The District argues that we should adopt the view expressed by Judge Newman that the doctrine of Pacifica should be extended to the high school context.[7] Relying upon Pacifica, Judge Newman reasoned, "If

---

7. Judge Kaufmann, writing for the majority in Thomas, disagreed with Judge Newman that the issue of on-campus distribution of the newspaper was before the court. Judge Kaufmann, nevertheless, questioned the soundness of Judge Newman's view on the issue of on-campus distribution: "We would hesitate, however, to conclude that the obvious need for a flexible application of the First Amendment in the school setting allows educational officials free-wheeling and unbridled discretion to prohibit expression they regard as indecent, even with the narrow confines of the schoolhouse." Id. at 1052 n.18.

the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds." Id. at 1057.

Thus, we are asked by the District to expand the doctrine of Pacifica beyond the context of broadcasting to the school environment. We believe the relevant inquiry is whether the Supreme Court's rationales for sanctioning government regulation of "indecent" speech in broadcasting are applicable to a high school assembly convened for the express purpose of providing a forum for students to make campaign speeches.

The Supreme Court's first rationale in Pacifica -- that broadcasting can be very intrusive upon the privacy of the home -- is plainly inapplicable to a high school assembly. High school students voluntarily attending an assembly to hear

student campaign speeches surely do not expect the same measure of privacy and protection from unwelcome language and ideas that they obviously do at home. A high school assembly is a very public place. In contrast, the Constitution treats homes as special sanctuaries for privacy. As the Supreme Court said in Cohen v. California, 403 U.S. 15, (1971):[8]

> "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue ..., we have at the same time consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."

---

8. The Supreme Court held in Cohen that under the First Amendment a state could not make it a criminal offense to wear a jacket in a courthouse bearing the words "Fuck the Draft." 403 U.S. at 26.

Id. at 21 (citations omitted).

The Supreme Court's second rationale in Pacifica -- that broadcasting routinely reaches impressionable young children -- is also inapplicable to a high school assembly. Fraser was not talking to children too young to read; he was speaking to young adults, many of whom as high school seniors on the eve of graduation would have already reached voting age. Realistically, high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives. Although we may be offended by some of what we see and hear, that is a price we must pay for the privilege of living in a free and open pluralistic society.

Thus, we hold that the rationales of Pacifica have no applicability to the high school environment, especially to an

assembly convened for student political speech-making. It is one thing to apply a standard of "indecency" to restrict the First Amendment protection of broadcasting out of concern for the privacy of the home and impressionable young children; it would be quite another to give school officials discretion to apply the amorphous standard of "indecency" to restrict the First Amendment freedoms of high school seniors' making campaign speeches for student office. We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as "indecency" in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools. Language that may be considered "indecent" in one segment of our

heterogeneous society may be common, household usage in another. Freedom to be different in our individual manner of expression is a core constitutional value; the First Amendment reflects the considered judgment of our Founding Fathers that government officials, including public school administrators and, for that matter, judges, should not be permitted to use their power to control individual self-expression.

Matthew Fraser testified that he knowingly used "sexual innuendo" in his speech nominating Jeff Kuhlman for school office. As Judge Tanner found, Fraser did so because he thought it would be effective to establish a rapport with his fellow students, and perhaps to amuse them. Whether he succeeded or whether he went over the line of good taste and became offensive is for his fellow students to judge when they cast their

ballots in the school elections.[9] Thus, we decline to expand the doctrine of Pacifica to give public school officials power to regulate the speech of high school students they consider to be indecent.[10] Accordingly, we hold that the First Amendment prohibited the District from punishing Fraser for making a speech that school officials considered to be "indecent."

---

9. Fraser's candidate went on to win the election.

10. We do not have to reach the question whether a school board may refuse to make books or other instructional materials available to students because they contain language deemed to be offensive. See Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 880 (1982) (Blackmum, J., concurring).

IV

In addition to relying on Pacifica and Judge Newman's concurring opinion in Tinker, the District cites a number of other cases as authority for the general proposition that school officials may control the language used to convey ideas at school-sponsored events.[11] In essence, the District argues that because school officals can control the agenda and subject matter of school-sponsored assemblies, they can regulate the speech of students who participate in the assemblies and can punish students for language that they find objectionable.

---

11. In support of its contention that the assembly was sponsored by the school, the District argues that the student body election for which Fraser was giving his speech is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district ...." Wash. Rev. Code §28A.58.115.

That school officials have broad discretion to control the content of the school curriculum cannot be disputed. See Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982). Although Fraser delivered his speech to a school-sponsored assembly, his speech was clearly not part of the school curriculum. The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.

Because this case does not involve the compulsory environment of the classroom, we find the District's reliance on Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982), to be puzzling. In Island

Trees, the Supreme Court held that a local school board's discretion to determine the content of its school libraries is limited by the imperatives of the First Amendment. The Court remanded the case for trial to determine the reasons behind the school board's removal of certain books from the library because "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Id. at 872 (quoting West Virginia Board of Education v. Barnette, 319 U.S. at 642). The Bethel School District's reliance on Island Trees is clearly misplaced because, as Justice Brennan said speaking for the plurality, school boards may not "extend their claim of

absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." Id. at 869. A fortiori, a voluntary student election assembly is even further removed from the "compulsory environment of the classroom" than a library. Similarly, in Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2d Cir. 1980), also relied upon by the school district, the court recognized that the First Amendment imposes fewer restrictions on a school board's discretion to choose materials for the school program than to regulate a student's right of expression. Id. at 441 n.3.

The case before us is also distinguishable from Nicholson, where we held that students in a journalism class that produces a school newspaper do not have a constitutional right to be free from

prepublication review by the school principal. 682 F.2d at 863. Nicholson did involve the compulsory environment of the classroom. The publication of the newspaper was part of a journalism class in which students were being taught how to be journalists. As we explained, "[T]he school possessed a substantial educational interest in teaching young, student writers journalistic skills which stressed accuracy and fairness." Id. Indeed, in Nicholson we explicitly pointed out that school officials had much greater latitude in reviewing a student publication that was part of the curriculum than in the case of a student newspaper that was an extra-curricular activity. In the latter case, we said that such "outright censoring or prohibition would require a strong showing on the part of school administrators that publication of that forbidden materials

would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" Id. at 863 n.3 (quoting Tinker, 393 U.S. at 509).

The voluntary, student-run assembly which Fraser addressed was clearly an extra-curricular activity, not part of the school curriculum. The assembly was in the best sense a student activity; the candidates and their nominators were on their own, free to exercise their individual judgments about the content of their speeches. In exercising his First Amendment rights at the assembly, Fraser was as free to express himself as if the students had organized a campaign rally in the cafeteria or outside on the school steps. See Tinker, 393 U.S. at 512-13 ("When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may

express his opinions, even on controversial subjects like conflict in Vietnam ....").

The other cases cited by the District are also inapposite. In Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981), for example, the Third Circuit explicitly distinguished the superintendent's permissible decision to cancel a drama class' production of "Pippin" from the constitutionally impermissible censoring of "non-program related expressions of student opinion." Id. at 216. The District's reliance on Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), where school officials restrained students' efforts to distribute a sex questionnaire, is also misplaced. The narrow question before the Second Circuit was whether the school officials made an adequate showing to justify their prohibition of the distribution of the

questionnaire. The court held that the record established a substantial basis for defendants' belief that distribution of the questionnaire would result in emotional harm to students. Id. at 520. There simply has been no such showing here.

When Fraser delivered his nominating speech to fellow students who were assembled for the explicit purpose of exchanging ideas and information about candidates for school office, he spoke under the protective cloak of the First Amendment. As the Supreme Court said in Keyishian v. Board of Regents, 385 U.S. 589 (1967):

> "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, [364 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that

> robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

Id. at 603. Just as in the political world outside the school, the First Amendment requires that the principal restraint on the choice of words and ideas in political dialogue is the risk of disapproval by the audience the speaker hopes to influence.

To their credit, Bethel High School officials created an open forum for students to express their political views; when they did so, they implicated the fundamental right of participation in the process of self-government, albeit a student government. The school officials are to be commended for giving the students an opportunity to gain practical experience in the democratic process. That is exactly what Fraser was doing. He made a personal judgment when he chose

to use sexual innuendo in his speech. It may have been politically risky to do so, but the decision was his and his alone to make. As long as the speech was neither obscene nor disruptive, the First Amendment protects him from punishment by school officials. As Justice Jackson said, "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia v. Barnette, 319 U.S. at 637. In conclusion, we hold that the District violated Fraser's First Amendment rights when it disciplined him for the language and verbal imagery he used in nominating

his candidate for office.[12]

The declaratory judgment and the award of attorney's fees and costs are AFFIRMED. Because the injunction served its purpose of assuring that Fraser qualified as a commencement speaker, it is VACATED as moot.[13]

---

12. It follows from our First Amendment analysis that we must also affirm Judge Tanner's declaration that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be "indecent" even when engaged in an extra-curricular activity. See infra note 1. Because we decide the case on First Amendment grounds, we need not review Judge Tanner's ruling that the District's action in removing Fraser's name as a graduation speaker violated his Fourteenth Amendment right to due process of law.

13. Fraser delivered a graduation speech without incident.

Fraser v. Bethel School District No. 403 - Nos. 83-3987/4142

Eugene A. Wright, dissenting:

The court holds today that school authorities are powerless to discipline a student who makes a crude and sexually suggestive speech during a school assembly. It further holds that the authorities had no choice but to allow the same student to address an audience of children, parents and distinguished community members in the school commencement exercises.

I dissent because the majority improperly usurps the authority of school officials to maintain and enforce minimum standards of decency in public schools. The court ignores the "delicate accommodation" necessary to insure that First Amendment freedoms coexist with

institutional needs. Thomas v. Board of Education, 607 F.2d 1043, 1049 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980), on remand, 505 F. Supp. 102 (N.D.N.Y. 1981). Further, it misunderstands and misapplies Tinker's "substantial disruption" standard in the context of indecent expression.

The facts are recounted in the majority's opinion. I add a few details to bring the majority's mistakes into sharper focus.

Fraser was a 17-year-old senior at Bethel High School when the incidents underlying this action occurred. The school is in Spanaway, Washington, a suburban community close to Tacoma. The community also is home to Pacific Lutheran University, a small, private university. Bethel High School is the only senior high school within the jurisdiction of defendant Bethel School District

No. 403. The events occurring there understandably engage the full attention of the local school board.

Fraser gave his speech during an assembly in the school auditorium. It was held during school hours and was attended by over 600 students and teachers. Attendance at the assembly was mandatory unless students preferred to study in the study hall. The assembly and the student elections associated with it were part of the official school curriculum, designed to teach rhetoric and leadership.

Fraser's speech used deliberate sexual innuendo in an effort to shock and excite his audience. It received its intended response. Students reacted with hooting and yelling. One student was observed simulating masturbation. Others simulated intercourse. Teachers noted

that some students were shocked and embarrassed.

The following day, several teachers complained to the principal that the speech was inappropriate in a school assembly. Several also complained that their classes were disrupted the day following the speech because of heated student reaction.

This court should begin with a presumption against judicial involvement in the schools. "[C]ourts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts." Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 868 (1982) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). See

also Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982).

Of course, neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969). Nevertheless, courts have largely recognized that schools are different from other public forums. Speech that would be protected on the street corner does not automatically deserve protection in the classroom or auditorium. Bender v. Williamsport Area School District, 741 F.2d 538, 560 (3rd Cir. 1984) (free speech right of students dramatically different than the right to communicate in a traditional public forum).

As one commentator notes, "[t]he school environment is unique due to its physically confining nature, the

immaturity of its population, and the special demands and needs of the educational purpose." Haskell, Student Expression in the Public Schools: Tinker Distinguished, 59 Geo. L.J. 37, 57-58 (1970). See also Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Tex. L. Rev. 477, 496-510 (1981). The factors that make schools unique for First Amendment purposes are all relevant here. The majority erred in failing to address them.

The first difference is the physically confining nature of schools. The Supreme Court has noted on several occasions that government may protect a captive audience from being unwilling auditors of offensive speech, at least in those places that we consider sanctuaries. Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726,

748-49 & n.27 (1978); id. at 759 (Powell, J., concurring); Rowan v. United States Post Office Dept., 397 U.S. 728, 736-38 (1970). The captive audience problems were magnified here, because school rules required students to attend the assembly or study halls. Students had no ability to walk away from the offending speech. Cf. Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975). Nor did they have any indication that speeches containing sexual innuendo would take place.

Second, it is constitutionally significant that Fraser's speech was made by a minor to other minors. While children clearly have some First Amendment rights, these rights differ in important respects from the rights enjoyed by adults. See generally, Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321 (1979). As the Supreme Court noted, "'[t]he world of

children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules.'" Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968) (quoting Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938, 939 (1963)). At home, parents are allowed to impose considerable restraints on their childrens' rights to "free expression." At school, the school authorities stand in loco parentis to enforce minimum standards of expression. See New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985) (reasonableness standard governs school searches).

Similarly, schools may act to protect the children from obscene or indecent language. The courts have consistently held that greater limits may be imposed on expression aimed at

children than would be allowable for communication aimed at adults. F.C.C. v. Pacifica Foundation, 438 U.S. at 749; Ginsberg v. New York, 390 U.S. at 638-40. Here, Fraser's audience was primarily composed of minors. The school authorities had a substantial interest in protecting them from expression which could be shocking, embarrassing or detrimental at their stage of development. The school authorities were in the better position to determine whether the speech was harmful to other minors. Here, they concluded that Fraser's speech was disruptive and harmful. We should not lightly question that judgment.

Finally, schools perform a special function in our society. They are entrusted with the difficult task of educating children and preparing them for full participation in adult society. In addition to transmitting necessary

information and techniques of learning to the students, we expect schools to instill citizenship, discipline, and acceptable morals. In short, we expect schools to inculcate society's values and help children become fully adjusted adults. See Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Brennan, J. for the plurality); Diamond, supra at 498-99.

As the Supreme Court recently noted,

> Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather they act in furtherance of publicly mandated educational and disciplinary policies.

New Jersey v. T.L.O., 105 S. Ct. at 741.

Given the special nature of the high school environment, school authorities have a right and a duty to condemn language that falls below the minimum standards of decency expected in the local community. "[W]hether a school condemns or tolerates indecent language

within its sphere of authority will have significance for the future of that school and of its students." Thomas v. Board of Education, 607 F.2d at 1057 (Newman, J., concurring).

> In determining where school authorities may draw the line [regarding obscenity, vulgarity and indecency], courts must consider not only the fact that teen-age children are involved, but also the fact that the school is a special-purpose environment existing under peculiar sociological conditions ... . It follows that a substantial degree of social propriety is called for in the operation of an effective educational system. It might even be said ... that discouragement of the use of obscene or profane language is a function of the school.

Haskell, supra at 56 (emphasis added).

In addition to the important function of schools in transmitting our culture's values, we must consider the tradition of judicial deference to the discretion of local school authorities in the management of school affairs. See generally, Board of Education v. Pico,

457 U.S. at 863-64; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42 (1973).

To the extent that schools are expected to transmit society's values, local school boards are in the better position to determine what these values are. See Diamond, supra at 509. Specifically, the community should have great leeway to define for itself the standards of decency expected in its schools. See Haskell, supra at 58.

School officials have wide latitude to balance free speech rights against the school's interest in avoiding endorsement of certain expression. Seyfried v. Walton, 668 F.2d 214, 216 (3rd Cir. 1981) (officials may censor school play). The assembly at which Fraser spoke was conducted during school hours, on school property, and students were required to attend the assembly or a study hall. As

a matter of state law, the "associated student body" election for which Fraser's campaign speech was given was a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district." Wash. Rev. Code Ann. § 28A.58.115. The school assembly, therefore, was a school district sponsored function that implied district endorsement of the students' activities.

The majority assumes that indecent language in a school can be prohibited only if it is legally obscene or likely to cause a "substantial disruption" under Tinker. Nothing in Tinker, however, "suggests that school regulation of indecent language must satisfy the criterion of a predictable disruption." Thomas v. Board of Education, 607 F.2d at 1055 (Newman, J., concurring). See also

Haskell, supra at 49. (Tinker inapplicable to obscene and profane speech.)

Tinker concerned regulation of pure political speech. The speech there, black arm bands to protest the Vietnam war, concerned a political matter towards which we expect our schools to remain neutral. In that context, the Court held that the school could only regulate this expression if it could predict "substantial disruption" of the educational environment. Tinker, 393 U.S. at 514.

This rationale is inapplicable to a school regulation which prescribes only the indecent manner in which an idea is expressed. Thomas v. Board of Education, 607 F.2d at 1055-57 (Newman, J., concurring). The Supreme Court has indicated on several occasions that government may regulate the time and place where ideas are expressed in an indecent or offensive manner. In Cohen v. California, 403 U.S.

15 (1971), the Court held that a state could not permissibly convict an adult simply for using a four-letter word. It indicated, however, that indecent speech could be prohibited in certain times and places. Id. at 19, 22.

The Court extended this rationale in F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), when it held that the FCC could limit the broadcast of offensive language to times when children would be unlikely to be exposed to it. Justice Stevens, writing for the plurality, noted that government had less authority to regulate "a point of view" than to regulate "the way in which it is expressed." Id. at 746 n.22. He stated:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. at 743 n.18.

The Pacifica plurality relied on a nuisance rationale to hold that the F.C.C. could regulate the time and context of offensive broadcasts. Id. at 750. It noted that indecent speech "'may be merely the right thing in the wrong place, -- like a pig in the parlor instead of the barnyard.'" Id. (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

Finally, the Court made a similar distinction between ideas and the manner in which they are expressed in Board of Education v. Pico, 457 U.S. at 871. In Pico, the Court held that whether a school district could remove books from its library depends upon the motivation involved. It stated, "[i]f petitioners intended ... to deny respondents access to ideas with which petitioners disagreed, and if this intent was the

decisive factor in petitioner's decision, then petitioners have exercised their discretion in violation of the Constitution." Id. The Ccurt noted, however, that it would be constitutional to remove books because they were "pervasively vulgar" or they were not educationally suitable. Id.; see also id. at 880 (Blackmun, J., concurring).

If indecent language may be regulated anywhere, it surely may be regulated in the schools. I would hold that school authorities may prohibit indecent and vulgar speech regardless of whether it satisfies Tinker's "substantial disruption" standard.

Even if the Tinker standard applies, the majority errs in taking an overly constrained view of what constitutes "substantial disruption." This standard is flexible, Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973), and should be

viewed in light of the delicate environment necessary to sustain learning. Id. at 175. "[B]ecause of the state's interest in education, the level of disturbance to justify official intervention is relatively lower in a public school than it might be on a street corner." Id.; see Thomas v. Board of Education, 607 F.2d at 1053 n.18.

Courts should not be eager to substitute their judgment regarding what is disruptive for that of the school authorities. Substantial disruption to the educational environment may result from speech or conduct that appears harmless to the outside observer.

"[T]he proper functioning of the school is not, except at its gross extremes, an objectively ascertainable phenomenon." Diamond, supra at 497. A speech which causes great distraction, excitement or embarrassment among the

students may disrupt the educational process as greatly as one which results in fistfights.

The sensitive nature of the learning process calls for great deference by courts to the judgment of teachers and administration. "[I]n the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place." Id. at 486.

Here, the school authorities found that Fraser's speech greatly impeded the daily business of education. They produced testimony substantiating their claim that Fraser's speech was sexually harassing and demeaning to female students. They concluded that the speech was both disruptive and potentially harmful to the learning process. We

should not be quick to second-guess that judgment.

I disagree further with the majority's cursory affirmance of the district court's holding that Bethel High School's disruptive conduct rule is unconstitutionally vague and overbroad. School district rules are not held to the same due process standards for vagueness and overbreadth as criminal statutes. Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973); Esteban v. Central Missouri State College, 415 F.2d 1077, 1087-89 (8th Cir. 1979), cert. denied, 398 U.S. 965 (1970).

Bethel High School's disruptive conduct rule was drafted specifically for the school environment. "Given this 'particular context,' the ordinance gives 'fair notice to those to whom [it] is directed.'" Grayned v. City of Rockford, 408 U.S. 104, 112 (1972).

Because school conduct rules cannot be drawn with the same precision as criminal statutes, some discretion must be left to school officials to decide what actions should be sanctioned. Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 442 (5th Cir. 1973).

As the Supreme Court recognized in New Jersey v. T.L.O., school disciplinary rules must be flexible to enable school officials to maintain an environment in which learning can take place.

> [T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. 'Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.' ... Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures ....

105 S. Ct. at 742-43 (citations omitted).

The discretion accorded school officials is limited when the school's disruptive conduct rule is used to infringe First Amendment rights. Hall v. Board of School Commissioners, 681 F.2d 965, 968 (5th Cir. 1982); Murray, 472 F.2d at 442. Here, however, Fraser's speech was not consitutionally protected. This court should defer to the school board's proper exercise of discretion.

Under the standards enunciated in Black Coalition, Bethel High School's disruptive conduct rule is neither vague nor overbroad. I would reverse the declaratory judgment and the award of attorney's fees and costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a minor, and E.L. FRASER, as his Guardian Ad Litem, Plaintiff, -vs- BETHEL SCHOOL DISTRICT NO. 403, et al., Defendants.	No. C83-306T FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiff's application for Declaratory Judgment and an Injunction, having come on regularly for hearing and the Court then ordering that trial of the action on the merits be advanced and consolidated with the hearing of the application pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and the trial on the merits being then held on the 31st day of May, 1983, Plaintiff appearing in person and through his counsel, Jeffrey T. Haley, Defendants

appearing through its counsel, William A. Coats, and Clifford D. Foster; the Court having received and considered evidence, briefs, and argument of counsel, and being fully advised now makes the following:

FINDINGS OF FACT

1. Plaintiffs Matthew N. Fraser and E.L. Fraser are citizens of the United States and residents of Pierce County, State of Washington. Plaintiff Matthew N. Fraser is seventeen (17) years of age and is a senior enrolled at Bethel High School, and is the son of the other two Plaintiffs.

2. On April 26, 1983, Matthew N. Fraser (hereinafter referred to as Plaintiff) delivered a nominating speech on behalf of a candidate for student body vice-president at an all-school assembly. Approximately 600 students were in attendance. Students were required to

either attend the assembly or a study hall, but were not prevented from walking out of the assembly at any time.

3. The speech in question did not contain any patently offensive words.

4. The speech used certain words and phrases which could have had secondary meanings with connotations related to human sexual activity. These words and phrases were chosen for the purpose of developing a rapport with the students. The speech was designed to win the election for the Plaintiff's candidate.

5. On the day after the speech was delivered, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech.

6. After delivering the speech on April 26, 1983, Plaintiff was asked to

meet with school officials. He was told to produce a copy of the text of his speech and directed to report to Defendant Ingle's office the following morning during the first period of the next school day. He was warned that disciplinary action may result from his actions.

7. The 1982-83 Student Handbook of the Bethel Senior High School, Section 1, contains rules governing the conduct of students at Bethel High School. On page 8, the section entitled "District Offenses" provides, in relevant part:

> In addition to the criminal acts defined above, the commission of, or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally these are acts which disrupt and interfere with the educational process.
>
> . . .
>
> Disruptive Conduct. Conduct which materially and substantially interferes with the

> educational process is prohibited including the use of obscene, profane language or gestures.

8. On Wednesday, April 27, 1983, Plaintiff met with Defendant Ingle, Assistant Principal of Bethel High School. Defendant Ingle provided Plaintiff with copies of letters from five teachers regarding his speech. Three of the five letters expressed personal judgments that the speech was "inappropriate", "distasteful", "obscene", and contained "blatant sexual references". None of the letters suggested that the speech disrupted the assembly or caused other students to disrupt the assembly. Plaintiff was given an opportunity to explain the circumstances involved in giving the speech. He was then provided oral and written notice that he had violated the high school's rule concerning disruptive conduct and was told he

would be suspended for three days effective immediately, and that his name would be stricken from the ballot of candidates for graduation speaker, and therefore precluding Plaintiff from speaking at graduation.

9. The Plaintiff had previously been approved, by the school administration, to be a candidate on the ballot for graduation speakers shortly before he delivered the speech in question.

10. Plaintiff became a write-in candidate for graduation speaker and was elected as one of the commencement speakers.

11. The Plaintiff has never been disciplined by the Defendant for any matter, and had not previously been subjected to corrective action to modify his conduct.

12. Plaintiff initiated a grievance of this disciplinary action. By

agreement of counsel the matter was submitted to the School District's hearing officer based on the written agreements of counsel and the hearing officer's independent investigation of the facts. On May 19, 1983, Plaintiff's grievance was denied in a written decision by Defendant Alexander acting on behalf of Defendant Hosman.

FROM THE FOREGOING FINDINGS OF FACT THE COURT MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding under the First and Fourteenth Amendments to the United States Constitution, Title 42 U.S.C. § 1983, and Title 28 U.S.C. §§ 1343(3) and 2201.

2. Student speech is a form of expression entitled to at least some protection under the First and Fourteenth

Amendments to the United States Consitution.

3. The Plaintiff's speech was not obscene under the appropriate tests for obscenity.

4. The Defendant's disruptive conduct rule for Bethel High School is unconstitutionally vague, uncertain, and indefinite within the meaning of the due process clause of the Fourteenth Amendment, by failing to define and clarify what constitutes material and substantial disruption of the educational process.

5. The disruptive conduct rule in question is substantially overbroad in violation of the First and Fourteenth Amendments to the United States Constitution, because the rule is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

6. The imposition of a short term suspension, as defined in the Washington Administrative Code, Section 180-40-205(3), was in violation of the rule governing short term suspensions as set forth in the Washington Administrative Code, Section 180-40-245(2). See, Quinlan v. University Place School District, 34 Wash.App. 260 (1983).

7. The imposition of punishment in the form of removal of Plaintiff's name as a candidate for graduation speaker, violates his rights to due process of law under the Fourteenth Amendment of the United States Constitution, Title 42 U.S.C § 1983.

8. A declaratory judgment should issue invalidating the three-day suspension and removal of Plaintiff's name from the list of candidates for graduation speaker.

9. Injunctive relief should issue requiring Defendant to allow Plaintiff to speak at Bethel High School's commencement exercise on June 8, 1983.

10. The Court will not award damages, costs, or attorney's fees, unless and until the parties are unable to reach a settlement on these matters prior to July 25, 1983.

DATED this 8th day of June, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a minor, and E.L. FRASER, as his Guardian Ad Litem, Plaintiff, -vs- BETHEL SCHOOL DISTRICT NO. 403, et al., Defendants.	No. C83-306 ORAL OPINION OF THE HONORABLE JACK E. TANNER May 31, 1985

THE COURT: I want to hear from the defendant as to the situation as the evidence stands under the guidelines of the Ginsburg Miller, the so-called Ginsburg Miller test. Are you familiar with those Mr. Coats.

MR. COATS: Yes.

THE COURT: All right, Take A, it says, whether the average adult applying contemporary community standards would find that the work taken as a whole appeals to the prurient interests of high

school students. So far all I have heard from are high school administrators or teachers, are they to be considered the average adult in the Bethel community school district. They are part of the charging parties here. Does this Court then consider their testimony as the average adult in the Bethel community school district.

What is your answer?

MR. COATS: I don't know how to get average adults, if you want me to call parents that would object to that speech, I have unlimited numbers.

THE COURT: We are now down to decision making. You said that you rested and I am asking, unless counsel wants to talk me out of it.

MR. HALEY: Your Honor, I have an expert on the subject on what is obscene in the community.

THE COURT: Do you want to open the subject.

MR. HALEY: I would like to make a complete record in the case, sir.

THE COURT: As far as I am concerned, you made it.

MR. HALEY: I agree, it is a very good record so far and they have called many of the same people that I expected to call myself.

THE COURT: I am asking the defendant, what in this record is the opinion of the average male, average adult, applying contemporary community standards in the Bethel School District.

MR. COATS: I would respond to your question like this, the rules in the handbook are approved by the Board of Directors of the Bethel School District, which are charged with adopting those rules. They are administered by the administrative staff of Bethel School

District. The parents of Bethel are well aware of that administration and I think this case is consistent with how they have been administered in the past. I think --

THE COURT: Has there ever been any case in the Bethel School District that these facts were applicable to.

MR. COATS: When you say the exact facts, I cannot respond to that.

THE COURT: You have rested your case and now I am looking at the guidelines that the Ninth Circuit and the Supreme Court says that this Court must judge as a matter of law. Not what I personally think or don't think, I have to apply these guidelines to reach a decision as to what is and what is not obscenity, because obviously, from all of the witness's testimony if the Court finds that it is not obscenity, you lose. That is what it is all about.

MR. COATS: I think our response is that there are different standards in a school assembly.

THE COURT: Yes, Ginsburg put that up.

MR. COATS: Ginsburg was a complete exclusion of a book that didn't involve the school set up.

THE COURT: All Ginsburg does is sort of balance the community interest with the student interest. If this was an adult in this case it wouldn't be so difficult, because we could go ahead and apply the Miller standards across the board, but I am supposed to modify the standards and it comes out some place between Ginsburg and Miller.

MR COATS: Mr. Foster will address that issue, he actually briefed it.

THE COURT: Yes.

MR. FOSTER: Your Honor, we are asserting that the Miller and Ginsburg

standards are not applicable to a school district rule limited simply to this premise within the school environment.

We are intending to show, I guess we put on our evidence, we think the cases demonstrate that we can use the common ordinary meaning of the word obscene for purposes of regulating Mr. Fraser's conduct, so we do not consider it a case of principles, that is punishing and proscribing distribution of literature to any minor in the State, the sale of material to people under 17 under that statute, therefore, we are considering that in the school environment a different standard of obscenity applies and certainly what is appropriate to be sold down on Pacific Avenue in a constitutional sense --

THE COURT: In reading from Washington State Administrative Code 180-40-215 it says, students rights, and

looking at subparagraph 2 it says, all students, not excluding Bethel High School, all students within the State of Washington, my addition, possess the constitutional right to freedom of speech.

MR. FOSTER: Yes, your Honor, and we believe that the constitutional right of freedom of speech as interpreted by the Federal Court does not include the right to engage in conduct and language that is offensive to other persons and we believe that our evidence as demonstrated that Mr. Fraser's speech meets precisely that challenge.

THE COURT: You paraphrase the law, you don't quite quote it, because the prong as modified for high school students is, the way I understand it, whether the average adult applying contemporary community standards would find that the work taken as a whole

appeals to the prurient interest of high school students.

I have heard nothing other than school administrators or principals from that community.

MR. FOSTER: Your Honor, I think that the people, the Board of Directors who were elected by the community in turn enforced the rules and actually write the rules for the high school level, I do think that they are indicative of the community and they are an adequate expression of those elected officials --

THE COURT: That is your position, all right.

B, whether the work depicts or describes in a manner that is patently offensive to adults when considered for presentation to high school students sexual conduct specifically defined by the applicable law or rules. Where do I

look to the applicable law or rules that define that specific sexual conduct.

MR. FOSTER: Once again, we are relying on the prohibition of the obscene language and disruptive conduct rule, your Honor.

THE COURT: All right.

MR. FOSTER: Once again though our basic position is that this is not the appropriate test for the school environment, we are not dealing with total suppression of material on the basis of obscenity to minors under a certain age, the situation we deal with in Ginsburg.

THE COURT: C, whether the work taken as a whole lacks serious literary artistic political or scientific value for high school students. It was delivered in a political context, wasn't it?

MR. FOSTER: It was delivered in a context, we believe, Mr. Fraser could

have made the point that his candidate was a man of endeavor or whatever he wanted to make the point without using the sexual innuendo.

THE COURT: What you say by that is that if he didn't conform to what was appropriate in the administration's view, that is what you are saying.

MR. FOSTER: We think that the administration was constitutionally asking in a permissible manner to restrict the presentation of his ideas in a non obscene --

THE COURT: So what we are getting down to is this word appropriate as being a prohibited as opposed to inappropriate, being disruptive, isn't that a subjective-type thing.

MR. FOSTER: Your Honor, everything --

THE COURT: Like beauty is in the eyes of the beholder.

MR. FOSTER: What we have here --

THE COURT: Because the words themselves here are not obscenity.

MR. FOSTER: But the meaning conveys was one of a latent sexual nature.

THE COURT: That is subject to interpretation.

MR. FOSTER: Language is subject to interpretation, your Honor.

THE COURT: Then we are down to freedom of speech under the First Amendment.

MR. FOSTER: Within the context of the school environment we do submit that the specialty calling for --

THE COURT: But that special case does not deprive Mr. Fraser or any other similarly situated from his constitutional rights as a citizen of the United States.

MR. FOSTER: We have no contention on that, your Honor.

THE COURT: All right, all you are saying is you can't use obscenity, so if it is not obscene, you lose and if it is obscene you win.

MR. FOSTER: No, that is not quite correct.

THE COURT: Well, what is it then?

MR. FOSTER: We feel that the disruptive conduct rule cannot draw an absolute distinction between speech and conduct. Conduct is a much broader term. Certainly, if somebody challenges another person to a fight that is conduct --

THE COURT: That is what I asked you, isn't that rule in itself ambiguous and uncertain?

MR. FOSTER: Not as applied to a high school student, I think Matt Fraser knew perfectly well what was expected of him during this assembly --

THE COURT: A high school student is supposed to know what the administrators

put down in the rules and adults aren't, how do you think we operate our criminal statutes.

MR. FOSTER: I think the criminal statutes are inapplicable to high school environment and I think in our cases cited in our brief demonstrate that. We are dealing with a different situation.

THE COURT: But he is entitled to specifically to know what he is prohibited from doing and he is specifically entitled, how did I break the rule, and he is specifically entitled to what the punishment is. They don't take that away from him.

MR. FOSTER: No, but what we have in the rule is a definition of punishment up to and including suspension and expulsion. The definition of additional punishment, if you will, under the Washington Administrative Code is simply, well, any other disciplinary action other

than the suspension or expulsion up to and including, once again, one is traditional and we believe forewarned aspects of discipline is the removal of the privilege to participate --

THE COURT: Okay, would you agree that the rule that Mr. Fraser is accused of violating does not specifically design any prohibited sexual conduct nor does it refer to any definition of sexual conduct.

MR. FOSTER: Your Honor, it has no definition of sexual conduct in the manner of the issue we have in Ginsburg. We will freely admit that.

THE COURT: All right. The question of punishment, what section of the WAC's are you depending on.

MR. FOSTER: Discipline is defined, there are three separate sections in the code.

THE COURT: In the short term.

MR. FOSTER: Short term suspension is defined separately, but in WAC 180-40-205, subsection 1, discipline is defined as all forms of corrective action or punishment other than suspension and expulsion and shall exclude the exclusion of a student from a class by a teacher or an administrator for a period of time not exceeding the balance of the immediate class period. Discipline shall also mean the exclusion of a student from any other type of activities conducted by or in behalf of the school district. It is a broad inclusive definition to which short term suspension, long term suspension and expulsion are set out as differing --

THE COURT: How do the students know the prohibited conduct what the suspension is, isn't everybody entitled to know the punishment?

MR. FOSTER: I think it is clear, first of all, we are dealing once again

with this school district setting and school officials have very broad authority screened only by the code provisions and the overriding concerns of the First Amendment and due process to regulate their behavior. What we are dealing with is that in the educational process discretion is a part of life, it is a part of teaching and the second thing is is creating discipline is designed to further the purpose of the school district.

THE COURT: Do you think that we have a head-on collision of the plaintiff's rights under the First Amendment and the school administrator's right to administer?

MR. FOSTER: I think that is true and I think in that conflict, your Honor, the Federal Court has recognized the necessity for the definite balancing of those First Amendment concerns with the

compelling state interests and I believe that is how it is specifically defined in cases that the particular court relied upon to respect that system. Judicial intervention has to be delicate and guarded and can only occur when we have basic constitutional value implicated by a school district --

THE COURT: What constitutional value was in the Quinlan case and the appellate court reversed that case.

MR. FOSTER: It was not a constitutional case, your Honor.

THE COURT: That is what I am saying, but we have a constitutional problem involved here.

MR. FOSTER: That is absolutely right, your Honor, this is before you on a section 1983 action by the plaintiff alleging that we have deprived Mr. Fraser of his constitutional rights. It does not appear on the state court basis --

THE COURT: Washington State Constitution and the First Amendment rights are the same thing, freedom of speech.

MR. FOSTER: I agree.

THE COURT: Tell me again, why did they reverse Quinlan.

MR. FOSTER: Quinlan involved whether it was appropriate for a school district to have a rule that said if you are caught drinking at a school dance you are automatically suspended for the rest of the semester, a long term suspension. The court rules that these WAC regulations and the statutes that authorizes those did not allow a school district to impose a predetermined penalty against the student, because they didn't use any judgment, they said you violated the rule, you are out for the rest of the semester.

THE COURT: I think you should read that case again. She wasn't charged with drinking at school.

MR. FOSTER: At a school activity, a school dance.

THE COURT: No, she wasn't, she was charged with drinking and being there. There was no charge that she drank at the school.

MR. FOSTER: That is correct, but this turns on the propriety of that rule as applied in a situation where a long term suspension is involved.

THE COURT: She had a spotless record with no discipline. The same way other than you might not be a conformist, or as one witness said, he is different, the same factual situation as to Mr. Fraser.

MR. FOSTER: I don't think these rules provide one free bite though.

THE COURT: Pardon?

MR. FOSTER: I don't think these rules provide one free bite.

THE COURT: It does, there is no prospective application to this, the speech was made.

MR. FOSTER: The point though, your Honor, is what we are determining ultimately is the constitutional right here and we feel that the constitutional right of free expression is one, to protect ideas and the flow of ideas from our society and I don't think that Mr. Fraser has demonstrated or can demonstrate that he is engaged in the constitutionally protected area of disseminating ideas of a political nature. We might call this a political speech because it was a high school assembly --

THE COURT: Do we look at the successful political campaign, the client won.

MR. FOSTER: We are judging there the effectiveness of this particular form of action, but what idea are we protecting here if we consider this sexually suggestive language to be constitutionally protected. Couldn't he have expressed his idea in a manner --

THE COURT: I am asking, counsel, is it disruptive just because I disagree with you or I would have done it differently, isn't that what the First Amendment is all about.

MR. FOSTER: I think the form of Tinker is, your Honor, is that there is those Viet Nam cases that says the final, non disruptive form of protest against the councils in Viet Nam, such as wearing of arm bands was not prohibited by the First Amendment, but the exception reads more loudly than the rule, if a school official can forecast it where --

THE COURT: We haven't got forecast here.

MR. FOSTER: Yes, we do, your Honor.

THE COURT: Where?

MR. FOSTER: We have a forecast and I think Mrs. Stewart's testimony indicates that if we allow students to get up and engage in sexually suggestive types of language that we can have a reasonable basis for predicting that this educational process will be disrupted.

THE COURT: How about the situation that the young ladies can wear, as one judge said, such sexually suggestive clothing.

MR. FOSTER: If the young ladies wear sexually suggestive clothing I suppose if we have a reasonable basis and we can demonstrate a reasonable basis for predicting that Tinker is permissible to regulate speech on the basis of a predictable disruption of the educational --

THE COURT: Why do you think that the Seattle Sea Girls, the Dallas cheerleaders and the Bethel School District wear certain costumes on cheerleaders, not to call their attention to them?

MR. FOSTER: Mostly why the cheerleaders wear the costumes that they do --

THE COURT: Because we want to look a them, obviously. It has nothing to do with the football game.

MR. FOSTER: You started this case, your Honor, by talking about what is appropriate and we are saying that we have a pig in the parlor here and I can say a speech was inappropriate and disruptive at a high school assembly --

THE COURT: My problem here is I cannot decide this case on what I personally think, I have to apply those guidelines, no matter what I think. I understand that administrators must run the schools, but I have here a claim of

protection of the First Amendment, which I do not take lightly.

MR. FOSTER: Correct, we feel, and we have cited you cases and I think the Thompson before the Board of Education case in New York --

THE COURT: Each one of them has to be decided on its facts.

MR. FOSTER: They also have to be decided under the appropriate analytical standards that we feel that school districts are entitled to, one, special consideration in the manner in which they draft their rule and the vagueness overbreath-types standards are unique to school districts and two, if here a school district can regulate non obscene in a constitutional sense it is certainly indecent --

THE COURT: I know nothing in any of the cases that you said that that rule

can be over broad or uncertain. It must be clarity.

MR. FOSTER: The rule as to the over broad --

THE COURT: There must be some way that someone other than school administrators can interpret it fairly.

MR. FOSTER: Well, we have cases where standards such as incorrigible, disruptive, in the words they are not in the best --

THE COURT: Here we have a case where the teacher said I invited him to talk to me about it. That is like turning on a spigot and she had trouble turning it off, because he didn't want to talk about it the next day in the Home Economics class.

MR. FOSTER: That is right, but the impact of the speech is reasonably predictable and if we let people get up and engage in sexually suggestive

features we are going to have a disruption in the educational process at the school district far above and beyond --

THE COURT: I would imagine in the Bethel community 20 years ago, if it was there at that time, it would have been one thing. When I went to school it wasn't even there, it was just woods, but things change in the community. What was permissive now was unheard of before and that is what the First Amendment is about.

MR. FOSTER: It was permissive to the administrators who were acting on behalf of that elected Board of Directors prohibiting indecencies. We feel his constitutional --

THE COURT: I think if there is a conflict between the authority to the school board and Mr. Fraser's constitutional rights to freedom of speech he has got to win, because if I understand the

interpretation it has to be the least intrusive, at least the regulation upon his rights under the First Amendment.

MR. FOSTER: I want to cite a case though that deals of a village's attempt to solve a problem of fraud. That is dealing once again with complete state suppression of an activity and not limited --

THE COURT: I look at plaintiff's brief the same way as I look at the defendant's. Lawyers get paid to be prolific, cut down trees, that makes newspaper and you write on it. It is probably a tragedy to the taxpayers and the people of the Bethel School District that this case is even here, but I guess it has become embedded in concrete now and people have taken up sides.

MR. FOSTER: I think in closing you have to recognize the unique environment of the school. We are not dealing with

complete suppression of freedom of speech --

THE COURT: I know, but the Washington State Legislature meant something when they say they have some rights, frankly I was surprised, but they do and after you modify the rights that you have, I am saying you as an adult, against those of high school students, what is it. You just can't abrogate all the rights by saying, regardless of what they are, the school board in their need to administer and have conduct, discipline that meets the appropriate standards of the school district may run into each other someplace along the line.

MR. FOSTER: But the point is that we feel that we are acting on constitutionally permissible ground, therefore, the incorporation of these standards to be there, regardless of what the legislature says.

THE COURT: I just do not see it and I think it is your burden to show the obscenity. I do not believe that the speech was obscene under the guidelines as I see them.

MR. FOSTER: Under the Ginsburg Miller?

THE COURT: Yes, under the Ginsburg-Miller and if they are not obscene under that then there is no violation, even if taking at the most liberal interpretation and I frankly do not understand the rule that provides the rule in question here, the one that starts out, disruptive conduct, the one that is in issue here, frankly I think it is over broad and uncertain and obviously the punishment is vague and uncertain, indefinite.

MR. HALEY: Your Honor, I think you are absolutely correct that you have to apply the law that has been announced by

the U.S. Supreme Court and the Circuit Courts appeals. I suspect, however, that the school district may argue that there is a new section that hasn't yet been recognized by the U.S. Supreme Court.

THE COURT: That is always an argument.

MR. HALEY: In preparation for that I would like to offer two facts in evidence, if counsel will stipulate to these facts, first, this was a student activity run by students and second, the --

THE COURT: That is in the pleadings. There was a student in charge of it. It is undenied.

MR. HALEY: Because it has been denied --

THE COURT: It hasn't been denied. There was a student in charge of it.

MR. COATS: There was a student in charge of the assembly, I will agree to

that, but we have over all responsibility for it.

THE COURT: I understand that.

MR. HALEY: The other fact is that student government activities are not funded by tax dollars.

THE COURT: What has that got to do with freedom of speech?

MR. HALEY: I expect that it may be a fact that will be used to argue one way or the other on this.

MR. COATS: I don't agree with the last statement of counsel.

THE COURT: I understand. Now, the question is since we are this far and the cost must be exorbitant to the Bethel School District people that will resolve anything, nothing, obviously. It will just polarize the situation between some of the students and teachers and the administration. It is a terrible situation and this Court is going to be caught

in the middle of it, no matter how I come out, it is going to be my fault, so I guess that is what I am here for.

I will sign this declaratory judgment setting aside the finding of disruptive, however it is going to be worded, conduct to that speech, which I found is not obscene.

The question now becomes, what is the situation on the student body's vote that Mr. Fraser was the second of three candidates to be the speaker.

MR. HALEY: Your Honor, Mr. Fraser has agreed that he will give a speech at graduation that is appropriate for a graduation speech and the students who are the members of the graduation committee all were in favor of leaving him on the ballot because they believe in fact that he would give an appropriate speech.

THE COURT: Counsel, isn't the problem the one that faced Adam Clayton

Powell in New York and faced the Congress of the United States, his constituents have voted him to that spot, can now the administration at this time remove him, doesn't he belong to them for good or for worse, or for bad.

MR. FOSTER: We admit that the school district --

THE COURT: Do they have the power to censor.

MR. FOSTER: I think they have the power to run their graduation ceremony in a manner they deem appropriate.

THE COURT: That is exactly what I'm talking about, hasn't the Supreme Court of the United States referred to that as censorship.

MR. FOSTER: Your Honor, in the Ninth Circuit in the cases recognized that some, ordinarily --

THE COURT: That some?

MR. FOSTER: That some censorship, if you will, is appropriate in high school.

THE COURT: Here we have now a student who stands absolved of anything and no previous discipline, what disqualifies him.

MR. FOSTER: I think, if you will, it is a preventative measure. Mr. Fraser has demonstrated once that what he thinks is appropriate for a speech in front of the assembly isn't what obviously the school officials feel --

THE COURT: Why don't you have him arrested then if he does something wrong.

MR. FOSTER: I suppose we could always pull off the stage, your Honor.

THE COURT: With a hook, with a gong. Somebody might get a nervous trigger finger.

MR. FOSTER: I guess the question is that if the Court is going to award him

the release that he has to be a speaker I suppose that we will have no choice, but in that event we would obviously want to move for a stay in that judgment.

THE COURT: He has a right to be made whole, put right back where he was. This is obvious that it was a second thought, the punishment, that took him off the list in the first place. It probably would have been better if the students would have said, no, then we probably wouldn't be here.

MR. FOSTER: Perhaps not, but I think you will find the declaratory relief and the injunction concerning the graduation ceremony at Beth High School intact.

THE COURT: It is just repugnant to me to be involved in this situation. I do not relish this type of situation and I didn't ask for the case. So what do you want to do, do you want to settle the

case among yourselves? I think you would be better off. I know, lawyers make records and people of the Bethel School District will pay for it and you will go to the Ninth Circuit and you will either win or lose and I am suggesting that you are going to lose however you come out, the people of that school district will lose and the lawyers are going to say, boy, I sure showed them, showed them what.

I have decided that the plaintiff is entitled to be a speaker. I do not want to enjoin the Bethel School District from doing anything, their job is tough enough, I understand that. I hope the parties will resolve this matter and I won't have to.

MR. COATS: Assuming we don't settle it and we do want to proceed, could we have an understanding as to time as time is very important.

THE COURT: I am sure that you will both submit findings of fact and conclusions of law.

MR. COATS: Could we have, if they are willing to do that, at no later than Friday, because graduation is next Thursday.

THE COURT: If you do not agree, if the parties do not agree to these terms I will sign such an order, however it is worded, providing Mr. Fraser be a commencement speaker at his graduation class. When is it, next Thursday?

MR. COATS: Wednesday, excuse me.

THE COURT: It will be signed no later than Tuesday. Hopefully, I won't have to enter such an order.

MR. COATS: There is no way to get that time shortened, there is nothing I can do and if it is signed on Friday at least we have that option. I have not said that we would appeal.

THE COURT: Counsel, neither you or plaintiff, at least you haven't suggested any findings of fact or conclusions of law, how will the appellate court know what I did, they have to have something to look at.

MR. COATS: You said you would sign no later than Tuesday.

THE COURT: No later than Tuesday. I found the closer the deadline the more people seem to pull together and say let's resolve something.

MR. COATS: I am just suggesting that could we have that order be signed no later than Friday. Obviously, I don't have findings and conclusions and if the order is going to be entered that it be entered at least this week so we have that choice to review it.

THE COURT: I personally have a problem that I can't sign it Friday and

no other judge since they haven't heard it can sign it.

MR. COATS: I agree with that.

THE COURT: Get them here and they will be signed no later than Tuesday.

MR. COATS: Judge, I assume that you would not consider a motion for a stay of your order?

THE COURT: I wouldn't make it. The way I understand it it is the same thing, it is a sex or a race or a religious discrimination case, the employer says, we already filled that job and here you would come in and say, we have had that commencement exercise and he is entitled to be made whole and the remedy must take care of that.

MR. HALEY: Your Honor, the only thing that remains then is damages and costs.

THE COURT: We can take those later. I am hoping that you resolve the whole thing.

June the 24th.

July 26th.

MR. COATS: That will be fine with me.

THE COURT: Hopefully, I think that the people of Bethel School District, regardless of who is the principal, regardless of who is the superintendent now everyone would be better off, I think. No one ever wins in these cases.

All right, thank you.

You must have your findings of fact and conclusions of law in by Friday.

(Court at recess)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a minor, and E.L. FRASER, as his Guardian Ad Litem, Plaintiff, -vs- BETHEL SCHOOL DISTRICT NO. 403, et al., Defendants.	No. C83-306T INJUNCTION AND DECLARATORY JUDGMENT

THIS MATTER having come on regularly before the above-entitled Court, and the Court having entered Findings of Fact and Conclusions of Law in this matter, it is now:

ORDERED that Defendants violated Plaintiff Matthew N. Fraser's rights under the First and Fourteenth Amendments of the United States Constitution and Title 42 U.S.C. § 1983, by subjecting him to a three-day suspension and removal of his name from the list of candidates for

graduation speaker at Bethel High School, it is further

ORDERED that any and all punishment imposed upon the Plaintiff, Matthew N. Fraser, in this matter, is hereby set aside and declared null and void. It is further

ORDERED that Defendant Bethel School District No. 303, its officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with them, and each and everyone of the named defendants, be and they are hereby permanently enjoined and restrained from, in any manner, refusing to allow Plaintiff Matthew N. Fraser from participating in the Bethel High School's

commencement exercises as a graduation speaker on June 8, 1983.

DATED at Tacoma, Washington, this 8th Day of June, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a minor, and E.L. FRASER, as his Guardian Ad Litem, Plaintiff, v. BETHEL SCHOOL DISTRICT NO. 403, et al, Defendants.	No. C83-306 JUDGMENT

This action came on for hearing before the court, Honorable Jack Tanner, District Judge, presiding and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Matthew Fraser, recover of the defendants, Bethel School District No. 403, et al., $278 as damages and $12,750 as costs and reasonable attorneys fees, with interest thereon at the rate provided by law.

Ordered and Approved as to form this 31st day of August, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Entered at Tacoma, Washington this ____ day of August, 1983.

CLERK OF THE COURT

Presented by:

/s/ Jeffrey T. Haley
JEFFERY T. HALEY,
Attorney for Plaintiffs

Approved as to form;
Notice of presentation
waived.

/s/ William A. Coats
WILLIAM A. COATS,
Attorney for Defendants

RCW 28A.58.115 Associated student bodies--Powers and responsibilities affecting. As used in this section, an "associated student body" means the formal organization of the students of a school formed with the approval of and regulation by the board of directors of the school district in conformity to the rules and regulations promulgated by the superintendent of public instruction: Provided, That the board of directors of a school district may act or delegate the authority to an employee of the district to act as the associated student body for any school plant facility within the district containing no grade higher than the sixth grade.

The superintendent of public instruction, after consultation with appropriate school organizations and students, shall promulgate rules and regulations to designate the powers and

responsibilities of the boards of directors of the school districts of the state of Washington in developing efficient administration, management, and control of moneys, records, and reports of the associated student bodies organized in the public schools of the state. [1984 c 98 § 1; 1975 1st ex.s. c 284 § 3; 1973 c 52 § 1.]

Severability--1975 1st ex.s c 284: See note following RCW 28A.58.113.